Public Prosecutor v Lin Yu Choy

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05–77 OF 2007
LOW HOP BING, HELILIAH AND SULONG MATJERAIE JJCA
10 SEPTEMBER 2009

Criminal Law — Dangerous drugs — Trafficking — Trial judge found respondent guilty of reduced charge of possession — Appeal by prosecution against conviction and sentence — Dangerous drugs found in bag carried by appellant — Whether mens rea of possession proved through inferences — Whether trial judge erred in equating drawing of inference with invoking of presumption — Dangerous Drugs Act 1952 ss 37(d), 37(da) & 39B(1)

Acting on information received, a police team ('the team') led by Chief Inspector Mazlan bin Murshidi ('the CI') kept surveillance at Jalan Sutera 6 in Johor Bahru. During that surveillance the team had seen a motorcycle ridden by Lin Yu Choy ('the respondent') overtaking the CI's car and turning into a side lane. While at the lane, the respondent was observed proceeding on foot to Jalan Sutera 6 holding a red plastic bag ('the bag') in his right hand. The CI and his team alighted from their cars, approached the respondent and identified themselves to the respondent. The respondent threw away the bag and took to his heels. The team gave chase and apprehended the respondent while the CI stood guard at the spot where the respondent threw away the bag. When the bag that the respondent was carrying was searched it was found to contain another plastic bag which in turn contained ten newspaper packages that contained a substance, which was later confirmed by the chemist to be 324.1g of monoacetylmorphines. The respondent was charged for trafficking in dangerous drugs, under s 39B(1)(a) of the Dangerous Drugs Act 1952('DDA'). The respondent denied any knowledge of the bag and its contents. According to the respondent the motorcycle did not belong to him but to one Chew Keat Chee ('Chew') and he had borrowed the same to go to a supermarket to purchase Christmas cards. The respondent claimed that while he was at the supermarket he had received a call from Chew informing him that Chew had left a package on the motorcycle. His defence was that while he was returning the package to Chew he was apprehended by the police. The respondent also claimed that when he was arrested he was not carrying the bag, which was in a basket at the rear of the motorcycle. The trial judge held that since the mens rea of possession was proved through inferences this was equivalent to applying the statutory presumption of possession contained in s 37(d) to found possession. That being the case the trial judge found that he could not rely on the presumption of trafficking as contained in s 37(da) of the Act to convict the respondent of trafficking as to do so would run afoul of the principle against

double presumption. The trial judge thus found the respondent guilty of the reduced charge of possession and sentenced him to 14 years of imprisonment and ten strokes of whipping. Dissatisfied with the reduction of the charge and the sentence, the prosecution preferred this appeal against the decision of the High Court. The prosecution submitted that the trial judge had erred in equating the drawing of an inference with the invoking of a presumption.

Held, allowing the appeal:
Inferences are quite distinct from statutory presumptions. The word 'inference' has been defined, inter alia, to mean 'the drawing of a conclusion from data' while the word 'presume' has been defined, inter alia, as 'assume to be true'. The court found that a presumption was one provided by law and involved a situation where the law provided proof of a fact in issue when basic evidence was available. The inference in this case, on the other hand, related to the element of knowledge based on the conduct of the accused, such as in running away and throwing the bag in this case. When a presumption was invoked, the burden on the accused was discharged by rebutting it on a balance of probabilities whereas an inference was rebutted by creating a reasonable doubt. In the circumstances, the trial judge had misdirected himself at the close of the defence case when he equated an inference with a statutory presumption. Thus the court imposed the mandatory death sentence under the original charge of trafficking (see paras 17–19, 24 & 26–27).

[Bahasa Malaysia summary

Bertindak atas maklumat yang diterima, sepasukan polis ('pasukan polis') yang diketuai oleh Ketua Inspektor Mazlan bin Murshidi ('KI') membuat pengawasan di Jalan Sutera 6 di Johor Bahru. Semasa pengawasan pasukan polis tersebut telah melihat motosikal yang ditunggang oleh Lin Yu Choy ('responden') memotong kereta KI dan membuat pusingan ke lorong tepi. Semasa di lorong tersebut, responden dilihat meneruskan perjalanan dengan berjalan kaki ke Jalan Sutera 6 memegang beg plastik merah ('beg') di tangan kanannya. KI dan pasukannya turun daripada kereta mereka, mendekati responden dan memperkenalkan diri mereka kepada responden. Responden membuang beg tersebut dan berlari. Pasukan polis mengejar dan menangkap responden sementara KI berdiri mengawal di kawasan di mana responden membuang beg tersebut. Apabila beg yang dibawa oleh responden digeledah ia didapati mengandungi beg plastik lain yang mana mengandungi sepuluh paket suratkhabar yang mengandungi bahan, yang kemudiannya disahkan oleh ahli kimia sebagai *monoacetylmorphines* seberat 324.1g. Responden dituduh mengedar dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Responden menafikan apa-apa pengetahuan mengenai beg tersebut dan kandungannya. Mengikut responden motosikal tersebut bukan miliknya tetapi dimiliki oleh seorang bernama Chew Keat Chee ('Chew') dan dia meminjam motosikal tersebut untuk pergi ke pasaraya untuk membeli kad Krismas. Responden mendakwa bahawa semasa dia berada di pasaraya dia

menerima panggilan daripada Chew memberitahu dia yang Chew telah meninggalkan paket tersebut di atas motosikal tersebut. Pembelaannya adalah semasa dia memulangkan paket tersebut kepada Chew dia telah ditangkap oleh polis. Responden juga mendakwa bahawa apabila dia ditangkap dia tidak memegang beg tersebut, yang mana berada di dalam raga di belakang motosikal tersebut. Hakim perbicaraan memutuskan bahawa memandangkan mens rea milikan dibuktikan melalui inferens ini adalah sama kepada penggunaan anggapan statutori milikan yang terkandung di dalam s 37(d) untuk mendapati milikan. Dengan demikian ini hakim perbicaraan mendapati bahawa beliau tidak dapat bergantung atas anggapan mengedar seperti yang terkandung di dalam s 37(da) ADB untuk mensabitkan responden terhadap pengedaran kerana jika berbuat demikian akan melanggar prinsip anggapan berganda. Hakim perbicaraan oleh itu mendapati responden bersalah terhadap tuduhan pengurangan milikan dan menghukum dia dengan 14 tahun penjara dan sepuluh sebatan rotan. Tidak berpuas hati dengan pengurangan tuduhan dan hukuman tersebut, pihak pendakwaan membuat rayuan ini terhadap keputusan Mahkamah Tinggi. Pihak pendakwaan berhujah bahawa hakim perbicaraan telah terkhilaf dalam menyamakan pembuatan inferens dengan membangkitkan anggapan.

Diputuskan, membenarkan rayuan:
Inferens-inferens adalah berbeza daripada anggapan-anggapan statutori. Perkataan 'inference' telah didefinisikan, antara lain, untuk bermaksud 'the drawing of a conclusion from data' sementara perkataan 'presume' telah didefinisikan, antara lain, sebagai 'assume to be true'. Mahkamah mendapati bahawa anggapan adalah satu yang diperuntukkan oleh undang-undang dan melibatkan situasi di mana undang-undang memperuntukkan bukti fakta dalam isu apabila ada keterangan asas. Inferens dalam kes ini, sebaliknya, berkaitan unsur pengetahuan berdasarkan tingkah laku tertuduh, seperti berlari dan membuang beg dalam kes ini. Apabila anggapan dibangkitkan, beban ke atas tertuduh dilepaskan dengan mematahkannya atas imbangan kebarangkalian sedangkan inferens dipatahkan dengan membentuk kesangsian munasabah. Dalam keadaan ini, hakim perbicaraan telah tersalah arah di akhir kes pembelaan apabila beliau menyamakan inferens dengan anggapan statutori. Oleh itu mahkamah mengenakan hukuman mati mandatori di bawah tuduhan asal mengedar (lihat perenggan 17–19, 24 & 26–27).]

Notes

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 191–274.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (folld)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 2 AMR 89, CA (folld)

Muhammed bin Hassan v PP [1998] 2 MLJ 273, FC (refd)
PP v Tan Tatt Eek & other appeals [2005] 2 MLJ 685; [2005] 1 CLJ 713, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 12(2), 37(d), (da), 39A(2), 39(da)(iii), 39B(1)(a)

Nurulhuda Nur'aini bt Mohd Nor (Deputy Public Prosecutor) (Attorney General's Chambers) for the appellant.
Ahmad Nizam Mohamed (Ahmad Nizam & Co) for the respondent.

Low Hop Bing JCA (delivering judgment of the court):

APPEAL

[1] The respondent ('the accused') was originally charged with the offence of trafficking in 324.1g of monoacetylmorphines, punishable under s 39B(1)(a) of the Dangerous Drugs Act 1952 (a reference hereinafter to a section is a reference to that section in the Dangerous Drugs Act 1952, unless otherwise stated).

[2] However, after the defence case, the learned trial judge found the accused guilty of the reduced charge of possession under s 12(2), punishable under s 39A(2). The accused was sentenced to 14 years imprisonment commencing from the date of arrest and ten strokes of whipping. Being dissatisfied with the reduction of the charge and the sentence, the prosecution preferred this appeal against the entire decision of the High Court.

CASE FOR PROSECUTION

[3] Acting on information, Chief Inspector Mazlan bin Murshidi ('PW4') led a seven member police party on 21 December 1999 to keep surveillance at Jalan Sutera 6, Taman Sentosa, Johor Bahru. They went there in two cars. At about 4pm, PW4 saw a Kawasaki motorcycle bearing registration No JDP 9010 ridden by the accused who overtook PW4's car. The accused's motorcycle turned into a side lane. PW4 and his party proceeded to the lane. From the lane, the accused walked to Jalan Sutera 6 and stood at the junction there. The accused was holding a red plastic bag ('exh P7A') in his right hand. PW4 and his men alighted from their cars respectively and approached the accused. When PW4 identified himself by showing his authority card to the accused, the accused threw away the plastic bag and took to his heels.

[4] PW4 stood guard at the spot where the accused threw away the plastic bag, while his men chased the accused. Detective Lance Corporal Kamal

apprehended the accused and brought him to the spot where the accused had thrown away the plastic bag earlier on. PW4 examined the red plastic bag in the presence of the accused; and found inside it another plastic bag ('exh P7B') which in turn contained ten packages wrapped in Chinese newspapers ('exh P8 to P17'). In each of these ten packages, there was a plastic package containing yellowish granular substance suspected to be heroin. PW4 conducted a search on the accused and found a wallet containing an identity card in the accused's back pocket, while a motorcycle key was found in his front right pocket. PW4 then brought the accused to the place where the motorcycle was parked. PW4 used the key and ignited the motorcycle. The accused and the exhibits were brought to the Narcotics Division of the Johor Police Contingent Headquarters, where they were handed over to the investigating officer, C/Insp Arsad bin Kamaruddin.

[5] Another member of the party, Sgt Ismail bin Harun ('PW5'), corroborated PW4's evidence.

[6] Under cross-examination, PW4 denied that:

(a) a black Honda Accord motorcar, parked at the entrance to the side lane, was the target;

(b) the accused was walking out of the lane and approaching the rear portion of the Honda Accord;

(c) the plastic bag (exh P7A) was found in the basket at the rear of the motorcycle; and

(d) the key to the motorcycle was in the ignition hole.

[7] The chemist ('PW3') confirmed that the exhibit contained 324.1g of monoacetylmorphines within the meaning of dangerous drug in s 2.

CASE FOR PROSECUTION

[8] At the close of the prosecution's case, the learned trial judge correctly applied *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 2 AMR 89 (CA); and *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 and embarked on a maximum evaluation of the prosecution's evidence, and held that the prosecution has sufficiently presented credible evidence that the accused was carrying the incriminating drug in his right hand and it was in the accused's physical possession.

[9] This in turn activates the presumption of trafficking under s 37(da)(iii). Hence, a prima facie case was established for the accused to answer.

DEFENCE CASE

[10] Besides the accused, two other witnesses namely, Lim Kian Aun ('DW2'), the driver of taxi No HJ 1595, and Lee Ming ('DW3'), the accused's uncle, testified for the defence.

[11] The accused's evidence was that on the day in question, he had telephoned one Chew Keat Chee ('Chew') in the same housing estate to borrow a motorcycle (Kawasaki brand) from him in order to go to The Store Supermarket to purchase Christmas cards. Chew's house was about 10 – 15 minutes' walk from the accused's house. Lee Meng (DW3) who was then with the accused overheard the telephone conversation. DW3 requested the accused to buy some Christmas cards for him also. DW3 knew Chew was a friend of the accused. PW3 described Chew as a man in his 40's and of the same size as himself. The accused had taken the motorcycle home before he proceeded to the supermarket. When the accused reached the supermarket, he received a call from Chew who informed the accused that he (Chew) had left a package on the Kawasaki motorcycle. Chew asked the accused to meet him at a restaurant along Jalan Sutera 6. When the accused went to the restaurant, he did not see Chew there. The accused made a left turn, into the back lane of the restaurant. At the junction of the lane and Jalan Sutera 6, he saw Chew's car, a black Honda Accord. The accused then parked the Kawasaki motorcycle near Chew's car. The key was still at the motorcycle's ignition. When the accused approached Chew's car, another car suddenly arrived. Several people alighted therefrom and arrested him. The accused said he had no time to run and was not carrying anything in his hand. He was then taken to the motorcycle where the police found the red plastic bag containing the drug in the basket at the back of the motorcycle. The accused denied any knowledge of this red plastic bag and its contents.

[12] At the close of the case for the defence, at p 73 of the appeal record, the learned trial judge held as follows:

> It is pertinent and relevant for me to state, at this point in time, that at the close of the prosecution's case, the court had found possession proven by way of inferences made as opposed to an actual finding of mens rea possession. As I had stated earlier on, it was by way of inferences that I had found that the accused was in mens rea possession of the drugs.
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> Upon a maximum re-evaluation of the totality of the evidence adduced herein, I am of the considered view that the inferences arrived at by me to prove mens rea possession falls under another category called proved possession. In arriving at such proved possession through inferences is equivalent to applying the statutory

presumption of possession contained in s 37(d) to found possession. In other words and in essence, inference so drawn are in fact similar to invoking a presumption to arrive at a conclusion. That being the case, the proved possession as such does not permit the application of the presumption of trafficking as contained in s 37(da) of the Act. To do so, would run afoul of the principle against double presumption as laid down by the Federal Court in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273.

DRAWING INFERENCE AND INVOKING PRESUMPTION

[13] The learned deputy public prosecutor Ms Nurulhuda Nur'aini bt Mohd Nor submitted that the learned trial judge had erred in equating the drawing of an inference with the invoking of a presumption.

[14] Mr Ahmad Nizam Mohamed, learned defence counsel, responded that the learned trial judge was correct in avoiding the application of double presumption under ss 37(d) and 37(da), in line with *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273.

[15] We must immediately emphasise that at the close of the prosecution's case, the learned trial judge had arrived at a specific finding of fact that the accused was carrying the incriminating drug in his right hand and hence in the accused's physical possession; and that by way of inferences, the learned trial judge had found that the accused was in mens rea possession of the drug. His Lordship has now equated the drawing of an inference with the invoking of a statutory presumption.

[16] The question that arises for determination now is whether the learned trial judge had correctly equated the drawing of an inference with the invoking of a statutory presumption.

[17] Inferences are quite distinct from statutory presumptions. This distinction is recognised in *Public Prosecutor v Tan Tatt Eek & other appeals* [2005] 2 MLJ 685 at p 711; [2005] 1 CLJ 713 at p 748 where Steve Shim FCJ (later CJ (Sabah and Sarawak)) discussed the issue of double presumptions under s 37(d) and s 37(da) respectively.

[18] *The Shorter Oxford English Dictionary*, (5th Ed), Vol 1 defines the word 'inference' to mean:

1. the action or process of inferring; the drawing of a conclusion from data or premises;
2. a conclusion drawn from data or premises; an implication, the conclusion that is intended to be drawn.

[19] On the other hand, in the same dictionary, the word 'presume' is defined, inter alia, as: A

> Assume to be true or proved in the absence of evidence to the contrary; presuppose; assume to be …

B

[20] Presumptions in the form of deeming provisions are creations of statutes, such as s 37(d) which creates the presumption of possession in the instant appeal in the following words:

> (d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug. C

[21] Chong Siew Fai CJ (Sabah and Sarawak) (as he then was) in *Muhammed bin Hassan* at p 287 illustrated that: D

> … the 'deemed' state of affairs in s 37(d) (ie deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs is arrived at. There need only to be established the basic or primary facts necessary to give rise to that state of affairs, ie the finding of custody or control. Such presumptions as under s 37(d) (and, for that matter, the one under s 37(da)) are sometimes described as 'compelling presumptions' in that upon proof of certain facts by a party (in our present case, proof of custody or control in s 37(d) by the prosecution) the court must in law draw a presumption in its favour (ie presumptions of possession and knowledge) unless the other party proves the contrary. Such a presumption has the compelling force of law. It is a deduction which the law requires the trial court to make … E F

[22] In trafficking cases, possession is an element which must be proved before one proves trafficking. The presumption in 37(d) merely requires proof of custody or control. With proof of custody or control including any inference arising from the known fact to arrive at custody or control, the law allows the element of possession to be arrived at by way of a deeming provision. G

H

[23] *Phipson on Evidence*, (16th Ed) at p 135, paras 6–16 explains that the effect of a presumption may be to require less evidence than would otherwise be necessary, or to make it unnecessary to call any evidence at all.

[24] In our view, a presumption is one provided by law. It involves a situation where the law provides proof of a fact in issue when basic evidence is available. When a presumption is invoked, the burden on the accused is discharged by rebutting it on a balance of probabilities, whereas an inference of fact is rebutted by creating a reasonable doubt. I

[25] The inference relates to the element of knowledge based on the conduct of the accused in running away and throwing the plastic bag. The invoking of the statutory presumption of possession was derived from custody or control to enable the deemed possession to be triggered under s 37(d).

[26] We hold that the learned trial judge had misdirected himself at the close of defence case when he equated an inference with a statutory presumption.

CONCLUSION

[27] On the foregoing grounds, we allowed this appeal, set aside the conviction and sentence imposed by the High Court and substituted it with a conviction under the original charge of s 39B(1)(a) and imposed the mandatory death sentence under s 39B(2).

Appeal allowed.

Reported by Kohila Nesan